EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000215/2025

Held in Glasgow on 2, 3 and 4 April 2025

Employment Judge L Wiseman

Mr R Millar (deceased)	**Claimant** **Represented by:** **Mr S Smith - Solicitor**
AKP Scotland Ltd	**Respondent** **Represented by:** **Mr T Pacey - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 26 January 2025 in which he complained of disability discrimination.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of capability relating to performance and denying the allegations of discrimination. The respondent conceded the claimant was a disabled person because he had (had) cancer, but knowledge of the disability during the claimant's employment was disputed. The respondent further disputed it had constructive knowledge of the disability.

3. The case was subject to case management which clarified the complaints of discrimination were:-

   (i) direct discrimination (section 13 Equality Act) where the less favourable treatment was the dismissal of the claimant;

(ii) discrimination arising from disability (section 15 Equality Act). The claimant's representative, in his submissions, confirmed this claim was no longer being pursued and accordingly it is dismissed;

(iii) failure to make reasonable adjustments (section 20 Equality Act). The claimant's representative, in his submissions, confirmed this claim was no longer being pursued and accordingly it is dismissed and

(iv) harassment (section 26 Equality Act) where it was said the instances of unwanted conduct arose from the manner of dismissal and in particular (a) not giving the claimant any prior notice that his work was being reviewed; (b) not giving him any notice that he could be dismissed; (c) not giving him any examples of what he had done wrong and inviting him to comment; (d) not giving him an opportunity to improve; (e) removing his laptop and office keys and sending him home and (f) leaving him to pack up in front of colleagues who were then aware of his dismissal.

4. The listing of the case for hearing was expedited due to the claimant's circumstances, and it was also agreed the claimant and his wife would give evidence remotely.

5. Mr Smith, at the commencement of the hearing, made the respondent and Tribunal aware that the claimant was in a hospice and could only give evidence for half an hour before taking a half hour break. The Tribunal proceeded in this way for the first morning, but were advised the claimant was unable to proceed in the afternoon. The evidence of the claimant's wife was interposed. The hearing continued the following day, to conclude the claimant's evidence, and the claimant then observed for the remainder of the morning. The claimant was unable to proceed in the afternoon. The hearing continued and arrangements were made for the claimant's representative to be able to consult with him to read the notes of the evidence and take instructions. Further time was then allowed for the claimant's representative to ask further questions of cross examination on points raised by the claimant. The claimant observed the hearing on the third day.

6. The Tribunal agreed written submissions could, in the circumstances, be provided. The time limit for submissions was extended at the request of the parties and submissions were received on the 6th May. The claimant's representative, prior to the expiry of the initial time limit for submissions, advised the Tribunal the claimant had passed away.

7. The Tribunal heard evidence from the claimant (two Affidavits had been prepared and were produced at page 66 and page 193 of the documents) and his wife, Mrs Susan Millar. The Tribunal also heard evidence from Mr Martin McColl, Managing Director; Mr Iain McEwan, Chairman and Mr Philip Mycek, Estimator Manager. A file of documents was made available to the Tribunal. The Tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

8. The respondent is a company operating as a contractor in construction and refurbishment works.

9. The claimant commenced employment with the respondent as a Senior Estimator on the 30 October 2023, and was employed until the 25 October 2024. The claimant reported to Mr Philip Mycek, Estimator Manager.

10. The claimant had been diagnosed with cancer of the colon on the 29 September 2022. The claimant underwent surgery in November 2022 and chemotherapy in December 2022. The claimant was given the all-clear in April 2023 and returned to work with his employer at the time (not the respondent).

11. The claimant did not disclose the fact of his cancer diagnosis or treatment to the respondent when he attended for interview: the claimant considered it was no longer a health issue.

12. The job of Estimator involves preparing a tender for work based on the invitation to tender, a design pack (which includes architect and structural drawings), other documents and a site visit. The respondent uses a number of specialist sub-contractors to carry out elements of the work and the

Estimator is required to obtain and review prices for work from the sub-contractors. Attention to detail is a key aspect of an Estimator's job.

13. The day prior to a tender being submitted, there will be a Tender Review meeting, where Mr McColl and/or Mr McEwan would meet with the Estimator to go through the tender and agree the mark-up. The role of the Estimator at these meetings was to identify risks or elements of which they were unsure.

14. The claimant's employment was subject to a three month probationary period. The claimant passed the probationary period but was advised by Mr Mycek that he *"should be mindful of attention to detail"* in respect of work going forward. Mr McEwan, Mr McColl and Mr Mycek had each noticed the claimant's attention to detail was not at the level expected of a Senior Estimator and items, in particular from sub-contract quotes, had been missed.

15. The claimant was paid a bonus in June 2024. Mr McColl was responsible for making initial recommendations regarding bonuses and he recommended no bonus be paid to the claimant because of the level of errors continuing to be made. Mr McEwan was responsible for reviewing Mr McColl's recommendations and he considered it was demotivating not to receive a bonus and for that reason he decided the claimant should be paid a modest bonus of £1000.

16. The respondent accepted there had not been any formal meetings with the claimant regarding his performance, but the issue of lack of attention to detail /thoroughness and not picking things up was raised with him throughout his employment. These matters were also the subject of ongoing discussion between Mr McEwan, Mr McColl and Mr Mycek because the same type of errors kept occurring.

17. Mr McEwan, Mr McColl and Mr Mycek, having discussed the issue during June/July, decided in or about August 2024 that they would start looking for someone to replace the claimant. This decision was taken because concern regarding the claimant's lack of attention to detail increased and the same problems kept occurring. The respondent concluded the claimant was not

ever going to achieve the standard required. Mr Mycek was tasked with approaching recruitment agencies.

18. The respondent raised with the claimant an issue regarding the sub-contract quotations on a job at Le Froy Street. The sub-contract quotations had been accepted, but there had been items missing from the quotation and qualifications included by the sub-contractor had not been identified and added to the quotation (for example, if one sub-contractor was reliant on another sub-contractor carrying out work, or providing a piece of equipment, the Estimator should have identified this and included a cost for it in the tender). These issues were raised with the claimant in August.

19. The respondent also raised an issue with a job in Cumnock which involved an industrial building, where the claimant had not included a price for an issue with nesting seagulls.

20. The respondent also raised issues with a University of Glasgow tender. Mr McColl, at the tender review meeting, wanted a breakdown of prices because, at that stage, it was important for Mr McColl to understand the scope of the job, how it had been priced, who was supplying materials, the sub-contractors involved and the profit. Mr McColl expected to receive a job summary, bill of quantities, correspondence, sub-contractor list and costs. There were no preliminary documents and so Mr McColl could not understand the prices for sub-contractors. Mr McColl raised this with the claimant but the claimant had been unable to answer his questions. There was a pause in the meeting whilst the claimant went to obtain further information. Mr McColl remained very concerned at the level of information provided by the claimant.

21. Mr McColl, at the end of the meeting, expressed concern to Mr McEwan and Ms Murdoch, Commercial Director, that the respondent was being exposed to risk and he had no confidence in what the claimant had done.

22. A meeting took place on the 22 October 2024 regarding a DWP contract. The issue with this contract was that in public-facing areas the tables and chairs required to be fixed to the floor, and so in terms of work, the tables and chairs required to be lifted to do work on the floor and then replaced and re-fixed to

the floor. The claimant had not costed for this work. The claimant acknowledged this error but explained there had not been a site visit. Mr McColl acknowledged this but considered that the issue would have been obvious from the drawings/photographs.

23. The claimant participated in the 22 October meeting via Teams because he had an issue with constipation.

24. The claimant worked from home on the 23 October.

25. The claimant attended at work on the 24 October and met with Mr McEwan regarding two ongoing DWP tenders. He was subsequently invited to meet with Mr Mycek in the training room. Mr Mycek informed the claimant that his attention to detail had not improved and because of this the company had to let him go. The claimant commented that the company had not seen the best of him in the last 12 months. This comment related to a personal family situation of which Mr Mycek had been aware.

26. The claimant handed over his laptop and phone, collected his belongings and left.

27. The respondent confirmed the decision in writing (page 168). The letter did not give a reason for the termination of employment. The letter did confirm the claimant would be paid four weeks' in lieu of notice.

28. The claimant emailed Ms Paterson, Finance Manager and Company Secretary, to ask if the termination payments could be made in two instalments because it would assist him from a tax perspective. Ms Paterson responded to say it was not possible to amend payments made through the payroll. However, the issue was raised with Mr McColl who confirmed a further payment of £620 be made to the claimant to address this issue.

29. Mr McColl and Mr McEwan had no knowledge of the fact the claimant had previously had cancer, nor did they have any knowledge of the claimant seeing his GP, having blood tests and going for a scan in October 2024.

30. Mr Mycek was aware the claimant had previously had "*a cancer scare*". In/about April 2024 Mr Mycek spoke to the claimant to advise that they were going to have to cover some of the work of another employee who was going to be absent for a time whilst he received treatment. The claimant advised Mr Mycek that he was aware of this because he had spoken to the employee who had disclosed that he was having tests for cancer. The claimant told Mr Mycek he had previously had a cancer scare. This was not discussed further and Mr Mycek did not know if the claimant had had cancer or treatment.

31. The claimant, during the month of August 2024, experienced discomfort in his abdomen and attended at his GP in early September. The GP arranged for samples to be taken, a prostate examination and a CT scan. The claimant was prescribed a course of antibiotics.

32. Mr Mycek was aware the claimant had been experiencing back pain and that he was attending his GP for check-ups and had a hospital appointment. Mr Mycek was not aware the claimant was concerned that cancer may have returned.

33. The claimant was informed on 1 November 2024 that cancer of the bowel had returned. The claimant has been having treatment since then.

34. The claimant, following his dismissal, searched for alternative employment. The claimant was advised by the recruitment agency that the interview he had attended had been successful and he would be offered a position. The claimant confirmed that he had received confirmation of a cancer diagnosis and because of that he could not accept the job.

Credibility and notes on the evidence

35. The claimant's case was that he had told Mr Mycek of his previous cancer diagnosis and treatment, and in September 2024, he had told Mr Mycek he was going for check-ups at the GP and was worried because the pain was in the same area as the previous cancer. The claimant maintained he had also told Mr Mycek that he was due to attend for a scan and that results would be available two weeks later. The claimant believed Mr Mycek would have told

Mr McColl and Mr McEwan. The issue of knowledge is dealt with in detail below, but the Tribunal preferred the evidence of the respondent's witnesses regarding these points and found as a matter of fact the respondent did not have actual (or constructive) knowledge of the claimant's disability (previous cancer) and did not have constructive knowledge of cancer in September 2024.

36. The Tribunal found the respondent's witnesses to be both credible and reliable. Mr McColl and Mr McEwan spoke mostly of the errors in the claimant's work and the decision to look for someone to replace him. Mr Mycek was very straightforward in his evidence and clear that the claimant had told him he had previously had a "cancer scare". There had not been any further discussion about that and Mr Mycek had not known whether the claimant had had cancer or treatment. He was not asked in cross examination what he had taken from being told the claimant had had a "cancer scare".

37. Mr Mycek did answer a number of questions by saying "don't recall" but equally, if there was a chance he might have said/done something, he conceded he might have. For example, he was asked if he had disclosed to others that the claimant had been to his GP for check-ups. Mr Mycek responded "I don't recall – I might have". He then gave an example that if someone had asked where the claimant was, he would have said, at an appointment. The Tribunal concluded from this that saying "I don't recall" was not a way of avoiding the question, but rather it conveyed that Mr Mycek was unsure and so could not give a yes/no answer.

Submissions

38. The representatives prepared written submissions which were exchanged, commented upon, and then sent to the Tribunal. The key points of the claimant's submission were that the respondent had actual knowledge of the claimant's disability (being the cancer diagnosis in 2022), failing which they had constructive knowledge of the claimant's disability in circumstances where they had sufficient information in advance of the second diagnosis to entitle the claimant to protection. The claimant also argued the dismissal was

an act of direct discrimination and made submissions in support of the complaint of harassment.

39. The key point of the respondent's submission was that the respondent did not have knowledge of the disability (either actual or constructive) and that the claim must fail on that basis. There was a further submission that disability had nothing whatsoever to do with the decision to dismiss.

40. I have had regard to the submissions, and the arguments raised are set out and considered below.

Discussion and Decision

Knowledge of disability

41. The issue of knowledge of disability lay at the heart of this case and accordingly the Tribunal decided to determine this issue first. The claimant's position was that the respondent had actual knowledge of disability from April 2024 based on the claimant's conversation with Mr Mycek regarding the need for them to cover a colleague's work. In the alternative, it was submitted that even if the respondent did not have actual knowledge, they had sufficient information in advance of the second diagnosis, to have constructive knowledge of disability. The respondent's position was that it had neither actual nor constructive knowledge of disability.

42. Mr Pacey referred in his submissions to the case of ***Gallop v Newport City Council 2014 IRLR 2014*** and Mr Smith referred to the case of ***Godfrey v Natwest Markets 2024 EAT 81***. The Tribunal had regard to both cases and noted from the first case that it was stated that "*before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person and, for that purpose, the required knowledge (whether actual or constructive) is of the facts constituting the employee's disability*."

43. In the latter case it was said that *"An employer will avoid liability that would otherwise have arisen under section 15 Equality Act, if it can show that it did not know and could not reasonably have been expected to know of the*

claimant's disability. The concept of constructive knowledge arises when, applying the test of reasonableness, the employer could reasonably have been expected to know, not necessarily the claimant's actual diagnosis, but of the facts that would demonstrate the claimant had a disability; that is, that they were suffering from a physical or mental impairment that had a substantial and long term adverse effect on ability to carry out normal day to day activities". It was noted the burden of proof is on the respondent, but expectations are to be assessed in terms of what was reasonable and that will depend on all the circumstances of the case.

44. The Tribunal next turned to consider the evidence regarding actual knowledge and the submissions. The Tribunal noted there was no dispute regarding the fact the claimant did not disclose to the respondent, when applying for the position and attending for interview, the fact of his cancer and treatment. The claimant considered he was in perfect health and that it was an issue which was behind him.

45. The claimant's evidence was that a fellow employee had disclosed to him that he was being referred for tests for cancer. The claimant had wanted to empathise with him and so had explained what had happened to him. Some days later the claimant had a conversation with Mr Mycek about the need to cover the colleague's work. The claimant told Mr Mycek he already knew of this and *"relayed the conversation [he] had previously had with him and so disclosed [his] previous treatment at that stage".* The claimant, in cross examination, added to this evidence by stating the fellow employee told him he *"had cancer",* told him the type of cancer and in response the claimant had told him he had had bowel cancer; he had then told Mr Mycek *"of my situation/condition a year earlier and that he was free of treatment but continued to be monitored".*

46. The Tribunal preferred Mr Mycek's evidence that the claimant had told him he had had a cancer scare and that there had been no further discussion of, or reference to, this. Mr Mycek did not know if the claimant had had cancer or treatment. The Tribunal preferred Mr Mycek's evidence because there were some discrepancies in the evidence of the claimant. The claimant, in his

Affidavit, referred to his fellow employee having tests for cancer, but in cross examination he stated his colleague had cancer. The claimant also made reference to explaining to his colleague *"what had happened to me";* said that he *"relayed the conversation to Mr Mycek"* and *"told Mr Mycek of my situation/condition".* These statements lack clarity and are open to interpretation. The tribunal preferred the evidence that Mr Mycek understood the claimant had had a "cancer scare" but beyond that he did not know if the claimant had had cancer or treatment. The Tribunal did not form any impression that Mr Mycek was trying to downplay what he had been told: the Tribunal accepted Mr Mycek genuinely did not know, based on what he had been told by the claimant, that the claimant had had cancer and treatment.

47. The Tribunal also considered that our preference of Mr Mycek's evidence fits with the approach of the claimant to his previous diagnosis. The claimant did not disclose his cancer and treatment at interview. The claimant considered himself to be in perfect health when he joined the respondent's employment. The Tribunal considered, against this background, that the claimant was not predisposed to discussing his previous diagnosis and treatment and the Tribunal inferred from that that the claimant would downplay it. In those circumstances, it lent weight to Mr Mycek's evidence that the claimant had made reference to a "cancer scare" and not to having had a cancer diagnosis and treatment.

48. The Tribunal concluded the respondent did not have actual knowledge of the claimant's disability of cancer.

49. The claimant next submitted the respondent had constructive knowledge of cancer based on the circumstances leading to the second diagnosis of cancer. The claimant accepted he had not told, or suggested to, Mr Mycek that he suspected a return of the cancer.

50. The claimant's evidence in chief was that he had experienced discomfort in his abdomen and was in a bit of pain. He visited his GP and it was arranged that samples would be taken, there would be a CT scan and a prostate examination. The claimant asserted that when he returned to the office, he

told Mr Mycek he had been to see the doctor and had a further appointment on 17 September to discuss things again after having started a course of antibiotics. The claimant asserted that after that appointment he told Mr Mycek there was a CT scan booked for 18 October and the results would be available two weeks later.

51. The claimant, in cross examination, maintained that he had told Mr Mycek that he was experiencing similar symptoms to those he had experienced previously and the pain was in the area where the cancer had previously been.

52. Mr Mycek accepted the claimant had told him he was going to the GP for a check-up. He had not known what this was for, although he had had a discussion with the claimant regarding back pain. Mr Mycek could not recall being told about the claimant going for a scan, although he accepted, in his response to another question that he had been aware the claimant had an appointment with his GP and an appointment at the hospital. He did know the claimant had requested to work from home on an occasion because of having constipation but he did not know what had caused this.

53. The Tribunal preferred Mr Mycek's evidence regarding these matters and the Tribunal found as a matter of fact that the claimant told Mr Mycek, in September, that he had visited his GP for a check-up. Mr Mycek did not know what checks were being done. The Tribunal inferred from Mr Mycek's evidence that he also knew there was a hospital appointment, and that the claimant was to have a scan.

54. The Tribunal preferred Mr Mycek's evidence because in the claimant's evidence in chief, (in his Affidavit), he did not suggest he told Mr Mycek where he was having pain or that he was worried the cancer had returned or that the tests arranged by the GP were to test whether the cancer had returned. The claimant was asked twice in cross examination whether he had told Mr Mycek of a suspected recurrence of cancer. The claimant did not confirm he had: he simply responded that he had told him of the abdominal pain he was having.

55. The claimant acknowledged there had been discussion of back pain and perhaps changing the mattress. The Tribunal considered the fact there had been discussion of back pain undermined the claimant's assertion that he told Mr Mycek of having pain in the area where he had previously had cancer. Further, the claimant had previously had bowel cancer and it would not be reasonable – even if the claimant had told Mr Mycek of pain in his abdomen – for a person to understand from that that it may relate to bowel cancer. The fact of the embellishment of evidence in cross examination tended to suggest an attempt to fill in gaps in the evidence in chief.

56. The Tribunal also had regard to the evidence of Mrs Millar who confirmed the claimant had visited the GP in September 2024 because of a *"strange pain/feeling".* The blood tests had all come back negative but the CT scan had to be done. Mrs Millar went on to say there were 5/6 conversations regarding the "possibility of having cancer" but the weight to be attached to this evidence was wholly undermined by the fact that it was the claimant's representative who suggested this in his question of the witness, rather than the witness giving this evidence. The Tribunal accordingly discounted this evidence, not only because of the leading question, but because it was at odds with the claimant's evidence and Mrs Millar's other evidence which had made no reference to this.

57. The Tribunal concluded from all this that although Mr Mycek knew the claimant was having some pains and had visited the GP about this, he did not know, nor reasonably could have known, that there was a suspected recurrence of cancer. This was particularly so given the fact there was nothing to suggest, or alert, Mr Mycek to this possibility because the information provided by the claimant was non-specific in terms of the pain, the scan to be done and the subsequent issue of constipation. There were no circumstances from which the disability of cancer could reasonably have been deduced.

58. The Tribunal concluded, for the reasons set out above, that the respondent had no actual knowledge of the disability of cancer (being the previous diagnosis and treatment of cancer) and had no constructive knowledge of cancer (being the recurrence of that condition in September 2024). The

respondent's lack of knowledge (both actual and constructive) means the claim brought by the claimant cannot succeed.

59. The Tribunal did continue to consider the claimant's claims, if (a) the respondent had actual knowledge of the disability (cancer in 2022) and (b) constructive knowledge of cancer in 2024.

Direct discrimination

60. The Tribunal had regard to section 13 Equality Act which provides that a person discriminates against another person if, because of a protected characteristic, the person treats the other person less favourably than s/he treats or would treat others. Section 23 Equality Act provides that in the comparison of treatment required for section 13, there must be no material difference in the circumstances relating to each case. Further, in cases where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

61. The claimant argued that he had, because of disability, been treated less favourably and the less favourable treatment was dismissal. There was no dispute regarding the fact the claimant had been dismissed and the Tribunal was satisfied that dismissal could amount to less favourable treatment. The issues for the Tribunal to consider are firstly, was there less favourable treatment and this involves consideration of the treatment of a comparator in the same, or similar, circumstances and secondly the reason for any less favourable treatment.

62. There was no suggestion of an actual comparator in this case and accordingly the Tribunal must compare the claimant's treatment to that of a hypothetical comparator. The Tribunal had regard to the case of ***Gould v St John's Downshire Hill 2021 ICR 1*** where it was stated that *"Where a Tribunal does construct a hypothetical comparator, this requires the creation of a hypothetical "control" whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic…. The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the*

answer to that question is that the comparator would not have been treated more favourably, this also points to the conclusion that the reason for the treatment complained of was not the fact that the claimant had the protected characteristic".

63. The Tribunal considered the hypothetical comparator in this case would be an employee of the respondent who did not have a disability and who carried out the same job as the claimant, had the same abilities as the claimant, and who had made the same type, and quantity, of errors as the claimant on an ongoing basis. The Tribunal noted there was no evidence before the Tribunal regarding whether there had been other dismissals for performance, or the respondent's approach in cases where performance was an issue. Mr Smith, in his submission, referred to Mr Mycek's evidence where he had referred to generally giving people the benefit of the doubt. The Tribunal did not consider this assisted the claimant because the evidence clearly demonstrated that this same approach had been given to the claimant in circumstances where there were concerns regarding the errors he was making and the fact he was given time to improve, but did not do so. The fact the claimant was required to pay attention to detail was raised with him at the end of his probationary period: he was given the benefit of the doubt and allowed to continue in the hope that these matters would be addressed.

64. There were no submissions regarding the issue of a comparator and how they may have been treated. Further, the only evidence before the Tribunal which was relevant to consider, was that the respondent supported the claimant's colleague, whose work required to be covered when he was having tests for cancer/undergoing treatment. The Tribunal concluded, in circumstances where there was no evidence to the contrary, that a hypothetical comparator would, if they had made the same type and quantity of errors on an ongoing basis, have also been dismissed. The Tribunal reached that conclusion because the job of Estimator was an important role within the respondent company and errors in estimating could lead directly to the respondent losing money. The Tribunal inferred from this that attention to detail was a key part

of the role and lack of attention to detail was not something the respondent could continue to tolerate.

65. The claimant has been unable to show that he was treated less favourably and for that reason the claim must fail.

66. The Tribunal did continue to consider the "reason why" question: that is, if there was less favourable treatment, was the reason for this "because of" a protected characteristic. This involves looking at the reason why the employer acted as it did. The Tribunal must consider the subjective motivations – whether conscious or subconscious – of the alleged discriminator in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied upon. In the case of ***Nagarajan v London Regional Transport 1999 ICR 877*** it was said that *"answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on protected grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."*

67. The Tribunal, in considering this question, had regard to the fact the evidence of the respondent's witnesses regarding the errors made by the claimant was accepted by the Tribunal. The Tribunal, in accepting the evidence of the respondent's witnesses, took into account the fact the claimant accepted, in cross examination, that he was advised by Mr Mycek to pay attention to detail; that the cost of a door (£400) in a project, would have been a legitimate concern for the respondent; that the issue of nesting seagulls had not been picked up or priced for; that he had not costed the fact tables and chairs were fixed to the floor and the respondent had raised concerns with him regarding the DWP contract.

68. The claimant challenged the respondent regarding the fact tender documents could have been produced showing the original tender with errors and the corrected version with costings. The respondent acknowledged this but

explained there had been a technical/cyber-attack following which they had lost much of their data. It was not known whether the particular documents involving the claimant had been lost. The Tribunal concluded the fact documents, which may have supported the respondent's position, had not been produced did not undermine the credibility of the respondent's evidence. The respondent's oral evidence was before the Tribunal: it was consistent , credible and reliable and on that basis the Tribunal accepted the respondent's evidence.

69. The Tribunal acknowledged the respondent had not addressed these matters formally with the claimant insofar as he had not been performance-managed or disciplined for the errors. However, the Tribunal was satisfied this did not undermine the fact that errors had occurred, they had been raised with the claimant and the claimant had been aware of them.

70. The Tribunal also accepted the evidence of the respondent's witnesses that they had had ongoing discussions regarding the errors made by the claimant and the fact there was no improvement. There was no dispute regarding the fact the claimant had been told by Mr Mycek, at the end of his probationary period, that he had to pay attention to detail. This was prior to the respondent having actual knowledge of the disability.

71. The Tribunal accepted Mr McColl's evidence that from June/July the respondent reached the conclusion that the claimant would not be able to fulfil the job as expected. Further, the plan was for Mr Mycek to continue to have the claimant improve, but if this was not achieved, then someone else would be engaged for the role.

72. The Tribunal accepted the claimant's argument that the respondent could have produced documentary evidence of their approach to recruitment agencies in August 2024 and/or of the appointment of the claimant's replacement. These issues were raised with Mr Mycek in cross examination and whilst he accepted the documents could have been produced, he did not give any explanation for why they had not been. The Tribunal did not consider the fact documents, which may have supported the respondent's position, had

not been produced undermined the respondent's position. The Tribunal found the evidence of the respondent's witnesses to be both credible and reliable and was supported by the fact that the claimant's replacement did start in November 2024.

73. The Tribunal asked whether, if there was less favourable treatment, the reason for it was because of disability. The first point to which it would have had regard was the issue of timing. If the respondent (Mr Mycek) had actual knowledge of the disability, and had had so, since April 2024, the question of why wait until October to dismiss the claimant arose, particularly when the claimant was, at that time, a healthy employee who had been given the all clear from his cancer diagnosis. The evidence, which the Tribunal accepted was that in or about June/July 2024 there had been discussions that the claimant would not be able to fulfil the job as expected. The respondent took the decision in August 2024 to approach recruitment agencies to find a replacement for the claimant. The Tribunal considered that all of the evidence pointed to, and supported, the conclusion that the respondent's discussions regarding the claimant and their decision to start the recruitment process had nothing whatsoever to do with the claimant's disability.

74. The tribunal would, if the respondent had had actual knowledge of the disability, dismissed the complaint of direct discrimination. The tribunal would have reached that conclusion because (i) the claimant did not show there was less favourable treatment and (ii) even if the claimant had established less favourable treatment, the reason for that treatment was not because of the protected characteristic of disability.

75. The tribunal next considered the claim if the respondent had had constructive knowledge of the disability of cancer (second diagnosis). The tribunal would also have decided to dismiss this claim because the claimant did not show there was less favourable treatment (see above). Further, even if the claimant had established there was less favourable treatment, the reason for that treatment was not because of the protected characteristic of disability. The Tribunal reached that conclusion having noted the following points. The respondent's discussions regarding ongoing errors and their decision in

August to approach recruitment agencies regarding a replacement for the claimant, was prior to the claimant having pain and seeing his GP. The Tribunal concluded in those circumstances that the decision to approach agencies to find a replacement for the claimant, was motivated by the fact of the claimant making errors and continuing to make errors notwithstanding he had been told to pay attention to detail.

76. The Tribunal did consider the claimant's argument that the timing of the dismissal was suspicious. The claimant's case was that the scan took place on 18 October, with the results due two weeks' later, and he was dismissed on 25 October. Mr Mycek's position was that whilst he knew the claimant was to have a scan, he could not recall being informed of the date of the scan. Mr Mycek dismissed the claimant at that time because the respondent had recruited someone to fill the claimant's position and they were starting at the beginning of November.

77. The Tribunal accepted Mr Mycek's evidence that whilst he knew the claimant was to attend hospital for a scan, he did not know the date of the scan. The tribunal considered this sat comfortably with the claimant's evidence that he was on holiday the week of the scan. The tribunal further accepted the respondent's evidence that they had recruited someone to fill the claimant's position and the person was due to start at the beginning of November. The Tribunal noted 25 October was the last Friday in the month and accordingly, in terms of timing, it was appropriate to terminate the claimant's employment before the person who had been recruited, commenced their employment. In the circumstances, the timing of the dismissal was not suspicious.

78. The Tribunal, having had regard to all of the above points, concluded the motivation (conscious and subconscious) for the dismissal of the claimant was because of the errors he made and, crucially, the fact there was no improvement. The respondent reached the conclusion the claimant was not able to operate at the level required of a Senior Estimator and that was the reason for dismissal.

79. The Tribunal, in conclusion, decided to dismiss the complaint of direct discrimination because the respondent did not have actual or constructive knowledge of the disability. Further, even if the respondent had had actual or constructive knowledge of the disability, the claim would have been dismissed because the claimant could not show he had been treated less favourably than a hypothetical comparator and, even if he had been treated less favourably, the reason for this was not because of disability. The Tribunal decided to dismiss this aspect of the claim.

Harassment

80. The Tribunal had regard to section 26 Equality Act, which provides that a person harasses another if he engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the other person. In deciding whether conduct has this effect, each of the following must be taken into account: (a) the perception of the person; (b) the other circumstances of the case and (c) whether it is reasonable for the conduct to have that effect.

81. The claimant alleged the following acts were acts of harassment:

(i) not giving the claimant any prior notice that his work was being reviewed;

(ii) not giving the claimant any notice that he could be dismissed;

(iii) not giving the claimant any examples of what he had done wrong and inviting him to comment;

(iv) not giving him an opportunity to improve;

(v) removing his laptop and office keys, and sending him home and

(vi) leaving him to pack up in front of colleagues, who were then aware of his dismissal.

82. The Tribunal first considered whether the acts alleged by the claimant took place and if so, whether this was unwanted conduct. The Tribunal, in doing so, noted the entire focus of the evidence at the hearing, had been on leaving him to pack up in front of colleagues.

83. The first alleged act of harassment was not giving the claimant any prior notice that his work was being reviewed. The Tribunal concluded this alleged conduct did not take place. The Tribunal reached this conclusion because it accepted the respondent's evidence (with which the claimant agreed) that errors had been raised with him on an ongoing basis. For example, the claimant accepted that at the end of the probation period he was told to pay attention to detail; that there was an issue with a £400 door being omitted from a tender; that there was an issue with nesting seagulls; that there was an issue with fixing tables and chairs to the floor.

84. The second alleged act of harassment was not giving the claimant any notice that he could be dismissed. The respondent accepted he was not given notice that he could be dismissed.

85. The third alleged act of harassment was not giving the claimant examples of what he had done wrong and inviting him to comment. The Tribunal concluded this alleged act did not occur and our reasons for reaching this conclusion are as set out above in respect of the first alleged act of harassment.

86. The fourth alleged act of harassment was not giving him an opportunity to improve. The Tribunal concluded this alleged act did not occur. We reached this conclusion because the claimant was informed of the errors and informed that he needed to pay attention to detail (that is, he needed to improve).

87. The fifth alleged act of harassment was removing his laptop and keys and sending him home. The respondent accepted the claimant was asked to return his laptop and keys and to leave the premises.

88. The sixth alleged act of harassment was leaving the claimant to pack up in front of colleagues, who were then aware of his dismissal. The respondent accepted the claimant returned to his desk and packed up some personal

belongings. The respondent did not know if colleagues were aware of his dismissal.

89. The Tribunal, for these reasons, was satisfied the claimant was not given notice that he could be dismissed; that he was asked to return his laptop, keys and asked to leave the premises and that he returned to his desk to collect personal belongings and felt colleagues were aware he had been dismissed. The Tribunal accepted these acts were unwanted conduct.

90. The Tribunal next asked whether these acts were related to the protected characteristic of disability. The Tribunal decided that, in circumstances where the respondent did not know, and could not reasonably have known of the disability at the time of these acts, they could not be related to disability. The Tribunal decided, for this reason, to dismiss this aspect of the claim.

91. The Tribunal, in conclusion and for all the reasons set out above, decided to dismiss the claim.

Date sent to parties **05 June 2025**